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91-289

Supreme Court, U.S.
FILED

JUL 1 1991

NO.....

IN THE SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK

October Term 1991

BURRELL INDUSTRIES, INC.,
Petitioner

v.

CONTRACTORS SUPPLY CORP.,
Respondent

CORRECTED PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state court violates a party's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by failing to conduct a hearing at a meaningful time to determine the scope and extent of jury bias where a juror discloses to the court that jury bias toward one of the parties prevents the jury from rendering a fair verdict.

2. Whether, under the circumstances of this case, the absence of appellate review as a matter of right under state law constitutes a violation of the Petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.



PARTIES TO THE PROCEEDING

The parties to the proceedings below are the same as listed in the caption except that Petitioner has since changed its name from "Ohio River Sand & Gravel Co." to "Burrell Industries, Inc." In accordance with Rule 29.1, Petitioner states that there are no parent or subsidiary corporations of Burrell Industries, Inc.



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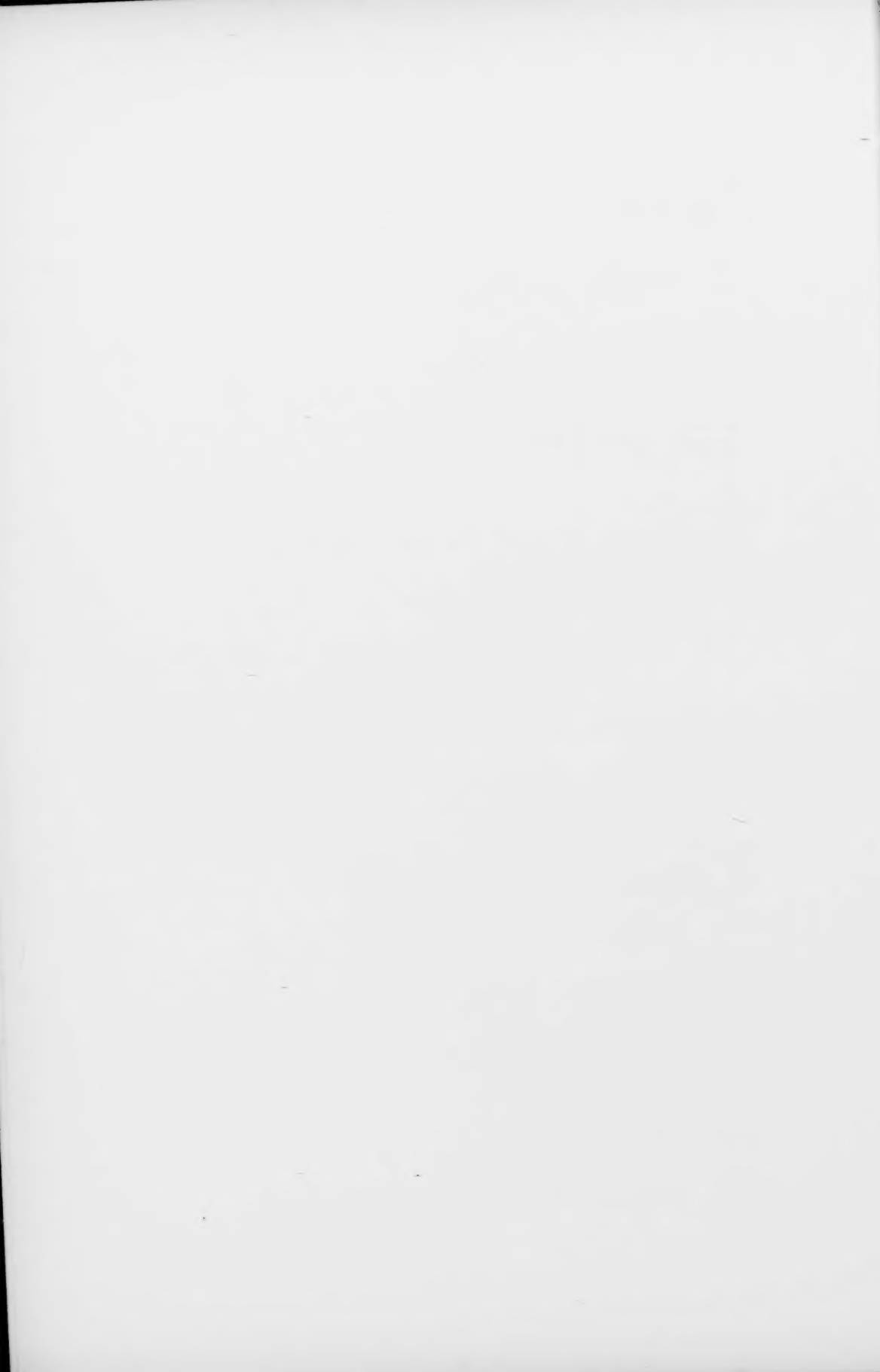
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NO.....

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BURRELL INDUSTRIES, INC.
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v.

CONTRACTORS SUPPLY CORP.,
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CORRECTED PETITION FOR WRIT
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OPINION BELOW

The opinion of the Supreme Court
of Appeals of West Virginia denying
Petitioner's appeal (see Appendix,
A-1) and the decision of the Circuit
Court of Ohio County, West Virginia
(see Appendix, A-14).



JURISDICTION

This Court has jurisdiction to review the questions presented by way of writ of certiorari under 28 U.S.C. §1257(a) in that the questions presented involve rights under the Constitution of the United States. The date of the judgment sought to be reviewed is April 2, 1991.

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge



the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This matter began in the Circuit Court of Ohio County, West Virginia, wherein the Petitioner herein [plaintiff below] filed a suit against the Respondent [defendant below] for damages resulting from an alleged breach of a contract for the purchase and sale of aggregates, such as sand and gravel, used for making concrete.

Because there were two written contracts signed by the parties that contained different language concerning the price to be paid for



the aggregates, two trials were held at the trial court level. The first trial concerned only which of the two contracts was the operative contract. The second trial concerned the question of whether the defendant breached the contract found by the jury to be the operative contract, the issue of damages and the defendant's counterclaim alleging the plaintiff overcharged it. The same jury heard both cases and, in the second trial, the jury returned a verdict in favor of the defendant on its counterclaim against the plaintiff and assessed the defendant's damages at \$100,000.00 [pre- and post-judgment interest have increased the amount to approximately \$180,000.00].

At the second trial, after the jury retired to deliberate, the trial



judge disclosed to counsel that one of the jurors on the second day of the trial [which occurred in the prior week] disclosed to the Judge [in the Judge's chambers without the presence of counsel] that she did not think there could be a fair trial in the case because the jury had feelings about one of the parties that would prevent them from giving a fair verdict. The Judge then stated that she inquired whether the jury's feelings were generated because of its sitting through the prior trial and, upon being advised by the juror that they were, the Court advised the juror that the jury would be instructed that personal opinions not based upon the evidence could not be considered by them in reaching their verdict.



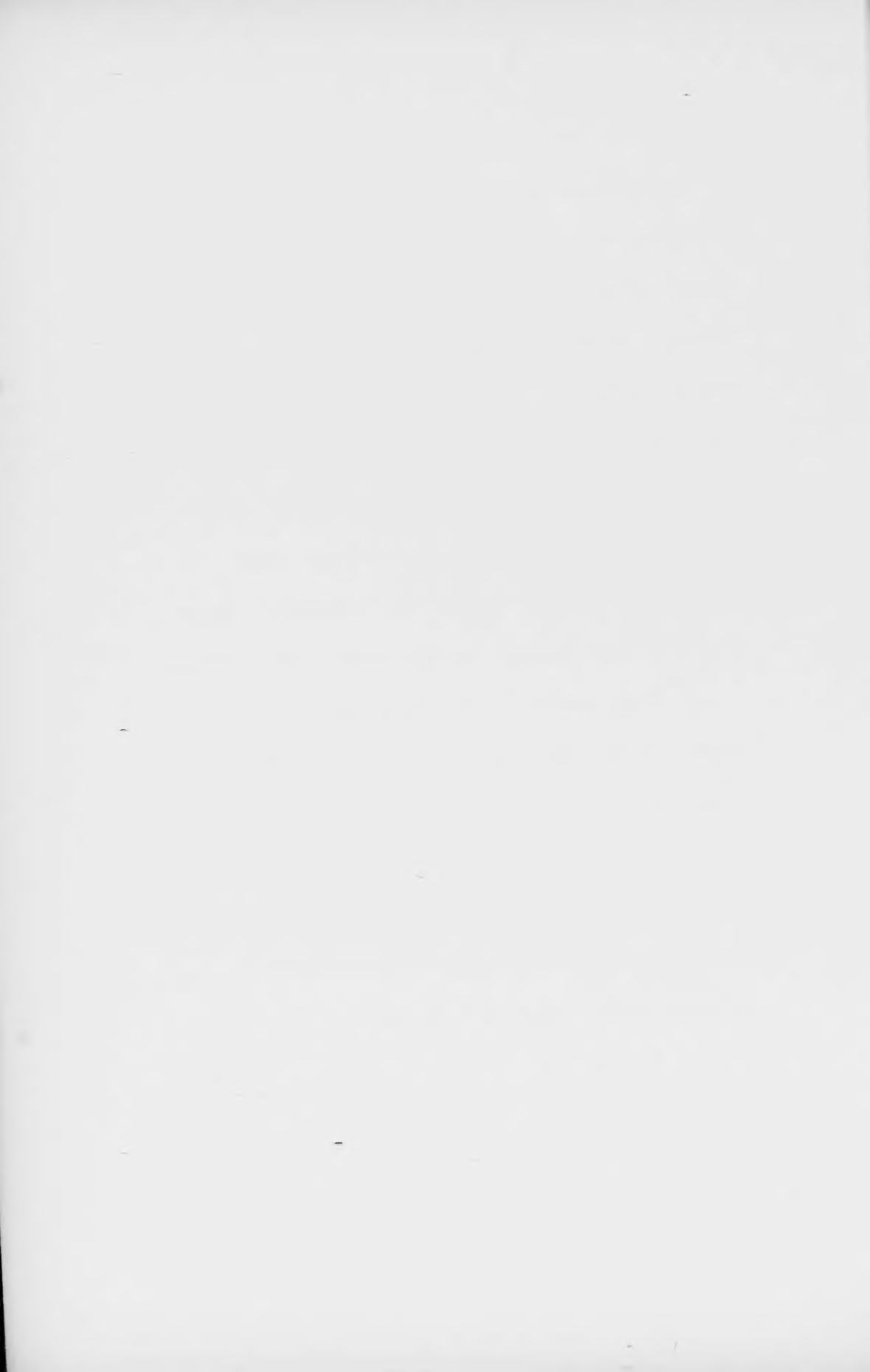
The Judge stated that the juror also referred to the juror's feelings about the case involving a small corporation verses a big corporation. Because of that latter remark, the Judge noted that she included, on her own initiative, an instruction advising the jury that it made no difference whether the case involved a small corporation against a big corporation.

After the disclosure, counsel for the plaintiff stated that he did not know if the disclosure required a response to which the Judge responded by stating "No, I think probably none of you know how to respond at this time. When the verdict comes in, I will probably have to meet again and discuss it."

1

Following the jury's adverse verdict on November 15, 1988, the Petitioner filed a Motion for a New Trial alleging, among other things, that it was deprived of the right to a fair trial because of the bias of the jury and requested a hearing in order to discover the scope, extent and duration of the jury prejudice. That Motion was filed on November 23, 1988.

Thereafter, on February 23, 1990, some 14 months after the jury verdict, the special judge appointed to hear that issue rendered a decision finding that the trial judge took sufficient steps to cure the problem. That action consisted of adding instructions which the Court knew, but which counsel did not know, addressed concerns of the jury and in polling the jurors to ensure that their



verdict was based solely on the evidence. In addition, the special judge indicated that the plaintiff failed to timely object to the trial judge's disclosure notwithstanding the fact that the trial judge specifically stated that no response was required at that time.

Thereafter, the plaintiff filed a Petition for Appeal with the Supreme Court of Appeals of West Virginia in which it was asserted that the plaintiff was denied a fair trial and that the trial court erred in not granting the plaintiff a hearing to determine the scope, extent and duration of the jury prejudice. By Order dated April 2, 1991, the Supreme Court of Appeals refused the Petition.

Because the Supreme Court of Appeals of West Virginia will not



consider a Petition for Rehearing in cases where the court refuses the appeal, Petitioner was unable to assert the second question presented concerning the absence of an automatic right of appeal as a violation of Petitioner's due process rights.

REASONS FOR GRANTING WRIT

1. The denial of the Petitioner's request for a hearing on the jury bias issue violates the Due Process Clause of the Fourteenth Amendment to the Constitution and is contrary to applicable decisions of this Court.

The Court has recognized that "a fair trial in a fair tribunal is a basic requirement of due process." Further, this Court has noted that "not only is a biased decision maker



constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness'" and that in some situations, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Withrow v. Larkin, 421 U.S. 35 (1975);
In Re Murchison, 349 U.S. 133 (1955).

The Due Process Clause

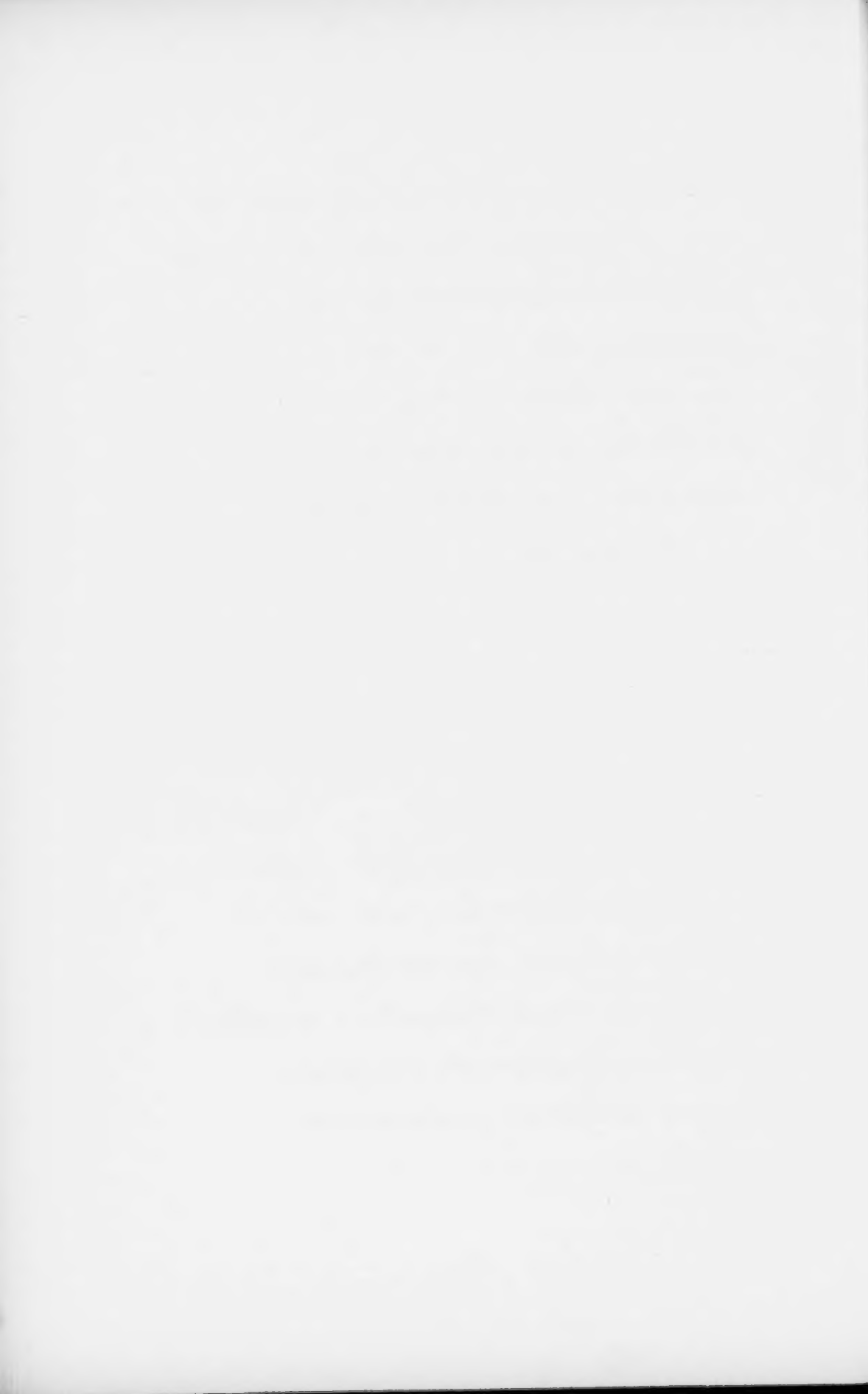
requirement of a fair trial before an impartial tribunal applies to civil as well as criminal cases. Marshall v. Jerrico, 446 U.S. 238 (1980). The neutrality requirement protects central procedural due process concerns and "helps to guarantee that life, liberty or property will not be taken in the basis of an erroneous or



distorted conception of the facts or law." "Justice," the Court said "must satisfy the appearance of justice." [Marshall, 446 U.S. at 242-43].

The "right to jury trial guarantees a fair trial by a panel of impartial 'indifferent' jurors" and the "failure to accord an accused a fair hearing violates even the minimal standards of due process. Both the trial court and the Court of Appeals have a duty to evaluate the jurors. Irwin v. Dodd, 336 U.S. 717 (1961).

It is thus clear that a fair trial is required under the Due Process Clause. The Due Process Clause also requires certain minimum procedural safeguards to protect against arbitrary state action.



Among the fundamental procedural due process requirements are the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67 (1972) "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." [Fuentes, 407 U.S. at 80].

Just how much process is due and the type of process due depends upon the protections a particular situation demands. Morrissey v. Brewer, 408 U.S. 471 (1972). But, the right to a hearing before a "neutral and detached" forum is among the "minimum requirements of due process." [Morrissey, 92 S.Ct. at 2604]. See



also Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

This Court has recognized the due process right to a hearing in numerous situations. Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension of students in public school system); Morrissey v. Brewer, supra., (revocation of parole); Fuentes v. Shevin, supra., (prejudgment replevin statutes); Wong Yang Sung v. McGrath, supra., (deportation proceedings); Connell v. Higginbotham, 403 U.S. 207 (1971) (termination of state employee); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (driver's license revocation). These due process requirements have all been duly noted and followed by the Supreme Court of



Appeals of West Virginia. See e.g.
North v. West Virginia Board of
Regents, __W.Va.__, 233 S.E.2d 411
(1977).

In this case, it is clear that a legitimate and substantial question of the jury's bias toward one of the parties was brought to the attention of the trial court and the Supreme Court of Appeals of West Virginia. It is also equally clear that the plaintiff requested a hearing to determine the scope and extent of the jury's prejudice. Neither the trial court nor the Supreme Court of Appeals granted the request for a hearing. Yet, in West Virginia Human Rights Commission v. TenPin Lounge, Inc., __W.Va.__, 211 S.E.2d 349 (1975), the Supreme Court of Appeals of West

Virginia, in Syllabus 2, stated as follows:

"Upon an allegation before a trial court that a juror falsely answered a material question on voir dire, and where a request is made for a hearing to determine the truth or falsity of such allegation it is reversible error for the trial court to refuse such hearing."

The failure of a state court, including a State Supreme Court, to follow established procedures under state law may result in a denial of due process where such failure "renders the state proceedings so fundamentally unfair or deficient that they are inconsistent with the rudimentary demands of fair procedure." Klimas v. Mabry, 599 F.2d 842, 847-48 (8th Cir. 1979).

The right to a fair trial before an impartial jury is among the most

important and fundamental rights existing in our legal system. The protection of that right through procedural due process is certainly as important as are the procedural due process rights against arbitrary governmental actions concerning students, parolees, possessors of driver's license and debtors, with respect to all of whom this Court has constitutionally guaranteed a hearing before detrimental governmental action is undertaken. If the Constitution guarantees a hearing to vindicate, protect and preserve those rights, no less can be required to vindicate, protect and preserve the most basic of rights--the right to a fair trial before an impartial jury. The failure of the state courts to grant the petitioner a hearing at a meaningful



time constitutes a violation of its due process rights. Petitioner respectfully requests that it be granted a hearing on the jury bias issue.¹

2. The absence of an automatic right of appeal in West Virginia violated the Petitioner's due process rights in that the Petitioner was deprived of a remedy for the violation of a substantial constitutional right.

West Virginia is among a small number of states that has neither an intermediate appellate court between the trial court and the State Supreme Court, nor the right of an automatic appeal. See Bilotti v. Dodrill, __W.Va.__, 394 S.E.2d 32 (1990). This Court has stated that the Constitution

does not establish a right to an appeal. See U.S. v. MacCollom, 426 U.S. 317 (1976); Griffin v. Illinois, 351 U.S. 12 (1956); McKane v. Durston, 153 U.S. 684 (1894). But, See Jones v. Barnes, 463 U.S. 745 (1983) (dissent of Justice Brennan).

The Petitioner contends, however, that as applied to the facts of this case, the failure of the Supreme Court to grant the Petitioner's appeal constitutes a violation of the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. As indicated previously, the Due Process Clause requires a fair trial before an impartial jury. The failure of the



Supreme Court of Appeals of West Virginia to review a substantial constitutional defect is, itself, a violation of the Due Process Clause. In the circumstances of this case, the Court's denial of the appeal constitutes arbitrary and capricious action which is prohibited under the Due Process Clause.

The West Virginia Supreme Court of Appeals has recognized that the constitutional right to a trial includes the right to a fair trial before an impartial jury. As Justice Brennan stated in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985), the "right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." He further noted that "when a state opts to act in



field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and in particular, in accord with the Due Process Clause." [469 U.S. at 400-401].

Where, as here, the Court has recognized or established the constitutional right to a fair trial before an impartial jury and where the court has clearly and expressly declared the right to a hearing concerning jury prejudice, the failure to grant the appeal or direct a hearing, constitutes an arbitrary and capricious denial of Petitioner's rights in violation of the Due Process Clause. As this Court stated in Irvin v. Dodd, supra., an appellate court has a duty to "independently evaluate"



the impartiality of the jury, [366 U.S. at 723], which did not occur in this case at either the trial court or appellate court stages of the case.

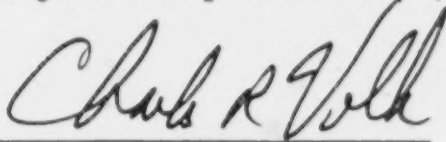
Where a State Supreme Court fails to provide a particular litigant the benefit of established state laws, such action may "result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure." Klimas v. Mabry, 599 F.2d 842 (8th Cir. 1979).

CONCLUSION

The Petitioner respectfully contends that the combination of the refusal of the trial court to grant it a hearing on the jury bias issue

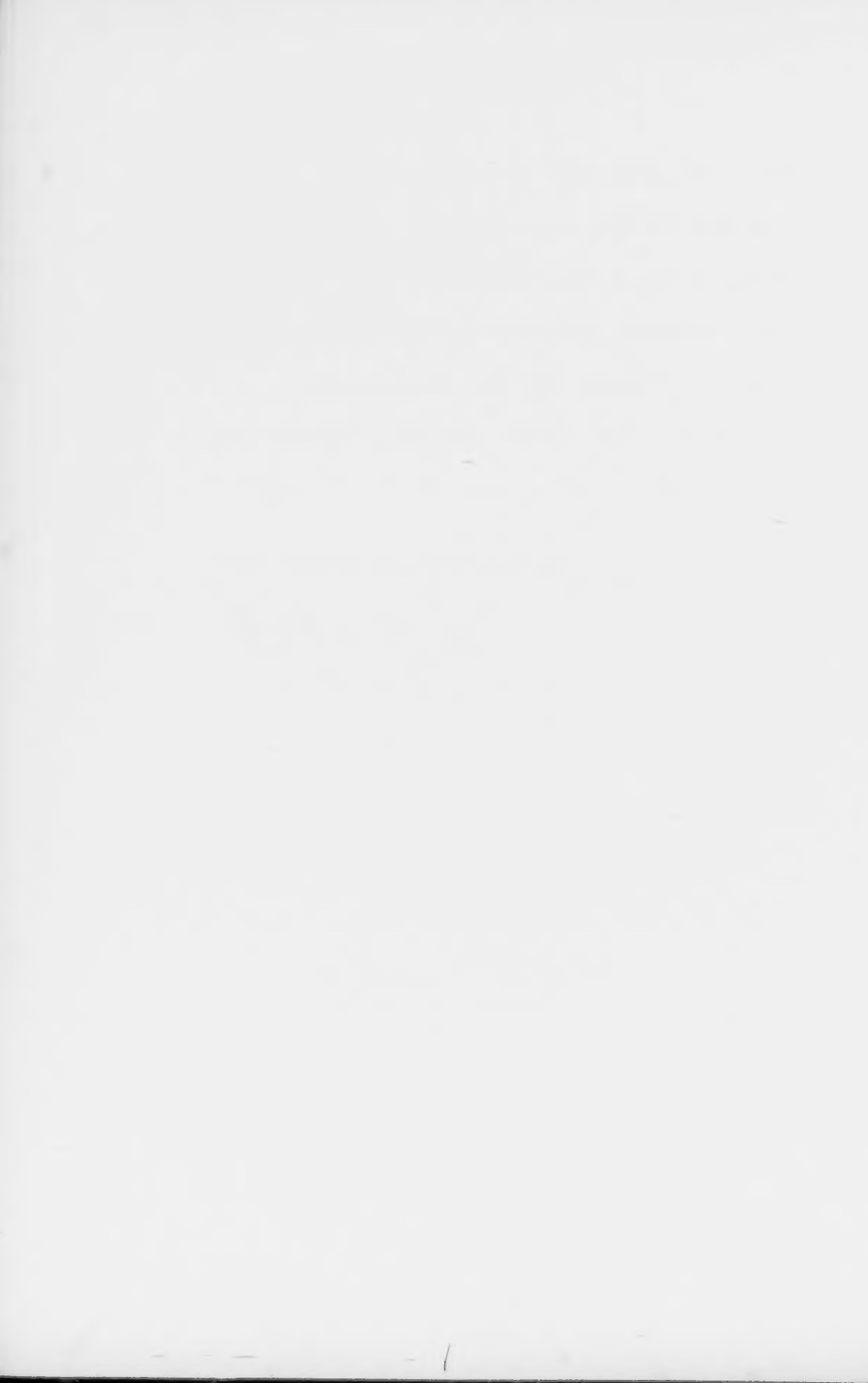
coupled with the refusal of the State Supreme Court to consider the appeal, results in a violation of the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment for which the Petitioner has no remedy.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charles R. Volk".

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APPENDIX



STATE OF WEST VIRGINIA

At a Regular Term of the
Supreme Court of Appeals continued and
held at Charleston, Kanawha County, on
the 2nd day of April, 1991, the
following order was made and entered:

Ohio River Sand and Gravel Company, a
West Virginia corporation, Plaintiff
Below, Petitioner

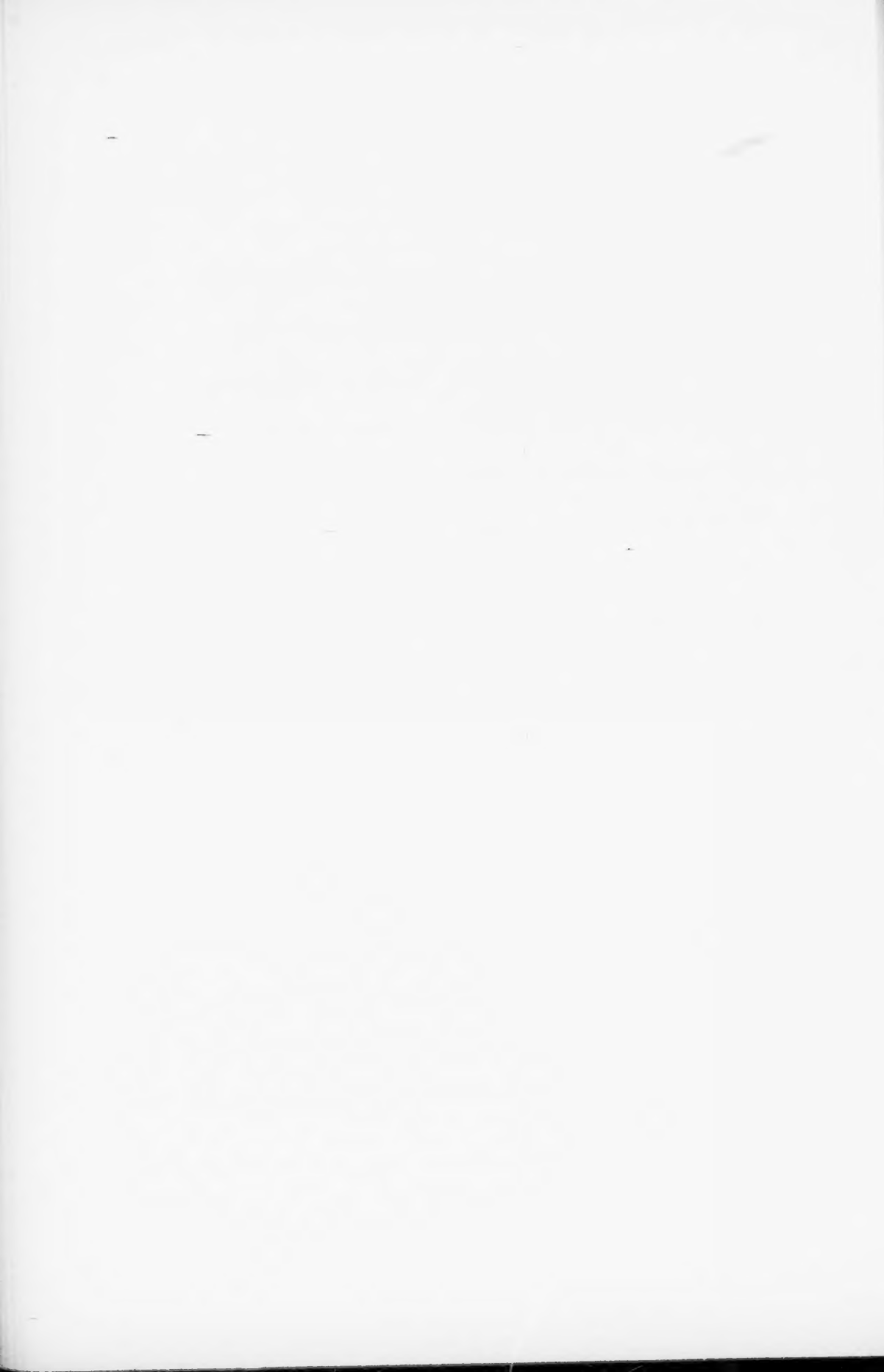
vs.) No. 910328

Contractors Supply Corporation, a West
Virginia corporation, Defendant Below,
Respondent

On a former day, to-wit,
February 28, 1991, came the
petitioner, the Ohio River Sand &
Gravel Company, a West Virginia
corporation, by Volk, Frankovitch,



Anetakis, Recht, Robertson & Hellerstedt, Arthur M. Recht, and Ronald B. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 25th day of May, 1990, with the record therein accompanying the petition. Thereafter, on the 12th day of March, 1991, came the respondent, Contractors Supply Corporation, a West Virginia corporation, by Schrader, Byrd, Byrum & Companion, James F. Companion, and Janet A. Sheehan, its attorneys, and presented to the Court its written response in opposition thereto. Upon consideration whereof, the Court if [sic] of opinion to and doth hereby



refuse said petition for appeal.

Justice Brotherton would grant.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court
of Appeals



IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

OHIO RIVER SAND & GRAVEL CO.,
Plaintiff, v. Contractors Supply
Corp., Defendant
Civil Action No. 86-C-271

Transcript of second trial November 9,
1988

COMMENTS MADE BY JUDGE TSAPIS AT THE
CONCLUSION OF THE CLOSING ARGUMENT,
AFTER THE JURY RETIRED TO THE JURY
ROOM TO BEGIN DELIBERATIONS:

JUDGE TSAPIS; On the second day
of the trial, the morning of the
second, one of the jurors approached
me, the lady that sits at the end, and
said she wanted to speak to me before
we began. I normally never discuss
anything with a juror, but thinking it
had to do with the scheduling since
some of the jurors were concerned
about their work schedule, I said,
"come in chambers".

She started out by making a

statement to me that she didn't think there could be a fair trial in the case and I said, "Why?" and she said - I don't know if she said we or they - had feelings about one of the parties that would possibly prevent them from giving a fair verdict. And I said, "Are those feelings feelings that were personal to the jurors before they were selected to serve on the jury originally, or feelings that were generated because of sitting through the prior trial in this case?" And she said it was, I said, "Based on the evidence you heard at the last case?" And she said, "Yes, it was based on the evidence in the previous case." And I said, "all the jurors will be instructed that personal opinions not based on the evidence can not be considered by them in reaching the

verdict at trial." And I decided to emphasize that in the final charge.

The main reason I didn't disclose that to all of you at the time was because I had hopes the matter would be settled without any further ado, and it didn't turn out that way. After we invested so much time in the trial I felt that rather than going ahead and doing anything and having to start the trial again, that I would wait and see what the outcome of this trial is going to be. I have been very concerned about it because I possibly should have immediately said something, but all those circumstances prevented me from doing that.

This juror also stated she wondered whether there would be feelings about this being a small corporation versus a big corporation



and I told her that they would be instructed in regard to that and that's the reason I threw into the final charge the point that it makes no difference if it's a small corporation versus a big corporation.

In all my seventeen years as a judge this is the first time I ever allowed something like this to happen and not disclose it immediately. I felt I had a justifiable reason.

I intend, when the jury reports their verdict, to have them polled and ask them at that point whether that person's verdict was based strickly on the evidence and after that it's going to be in the hands of the attorney in regard to what they want to do about the disclosure.

MR RECHT; I don't know if it requires a response.

THE COURT; No, I think probably none of you knows how to respond at this time. When the verdict comes in I probably will have to meet again and discuss it.

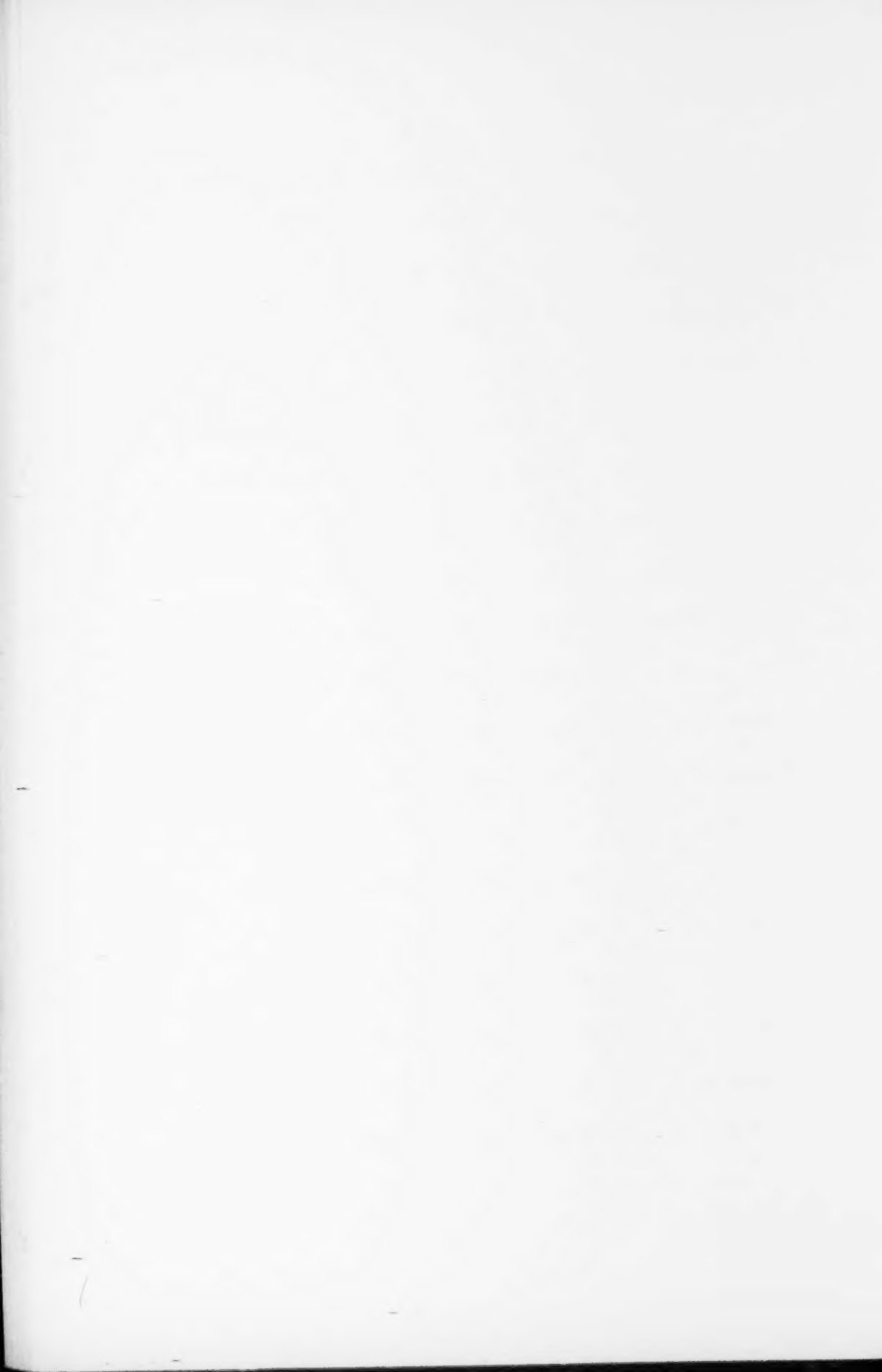
(Whereupon the jury notified the judge they had a question, which read as follows:)

THE COURT; "We would like to see the judge's notes from today."

I think the Supreme Court says you have to give it to them if they ask for it. Look at this and see what you think.

MR. STAMP; Isn't there a rule that prohibits giving it to them?

THE COURT; There's a recent Supreme Court decision about it. Recent developments in civil law. I think there's a recent decision that



says you have to give it to them if they ask for it.

MR. RECHT; I recall it, but I thought there were certain...

MR. STAMP; I'd like to see that case.

THE COURT; It would be a 1988 case.

MR. RECHT; Is it in the slip opinions?

THE COURT; Yes.

(COUNSEL proceeded to the Law Library to research the law.)

MR. RECHT; Insofar as Ohio River Sand & Gravel is concerned and Rule 51 would require Ohio River Sand & Gravel would be willing to consent to allowing the instructions to go to the jury.

MR. STAMP; Contractor's Supply does not consent.

THE COURT; Okay. I'm just going to write a little note. 'I can read the charge to you again. Judge C.T.'

(WHEREUPON the jury came back into the courtroom at 4:01 p.m. and the following took place:)

THE COURT; I'm sorry, but there are rules about doing this and I'm not quite certain where we stand, so I would just as soon read it again.

(Whereupon the judge read the charge in full to the jury and they returned to the jury room to continue their deliberations at 4:25 p.m.)

(Whereupon at 4:55 p.m. the following took place:)

THE COURT; At about five to five o'clock the jury sent a note to the judge asking the following question; "If we settle in favor of a party, can

we award damages in any amount (even \$1.00)?"

The court simply answered yes to that question and the note was returned to the jury room.

(Whereupon at 5:26 p.m. the jury informed the court they had reached a verdict and the jury panel came into the open courtroom;)

THE COURT; Have you reached a verdict?

FOREPERSON; Yes, Your Honor.

THE COURT; Would you give the form to the bailiff so that he can give it to the clerk.

THE CLERK; We, the Jury, find in favor of Contractor's Supply and assess damages in the amount of \$100,000.00. Charles Jerrome, Foreperson.



THE COURT; The court would like to poll the jury. Did you reach this verdict based only on the evidence you heard in this trial and the previous trial of this case?

JUROR; Yes I did.

THE COURT; Did you reach this verdict only on the evidence you heard in the previous case and this case?

JUROR; Yes Your Honor.

THE COURT; Did you reach the verdict based only on the evidence you heard in this trial and the previous trial of this case?

JUROR; Yes Your Honor.

THE COURT; Did you reach this verdict based only on the testimony you heard in this case and the previous case?

JUROR; Yes I did, Your Honor.

THE COURT; Did you reach this verdict based only on the evidence you heard in this case and the previous trial?

JUROR; Yes I did Your Honor.

THE COURT; Did you reach your verdict based only on the evidence in this case and the previous case?

JUROR; Yes.

THE COURT; Very well. Thank you very much for your service. This has been a very trying case. Contract cases are usually not as exciting as some of the others. Thank you very much.

MR. RECHT; We will simply reserve the right to file motions within the time period established by the Rules.

THE COURT: Very well. Thank you.



IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

OHIO RIVER SAND & GRAVEL
COMPANY,

Plaintiff,

vs

Civil Action
No. 86-C-271

CONTRACTORS SUPPLY
CORPORATION,

Defendant.

MEMORANDUM ORDER

This matter came before the
Circuit Court of Monongalia County,
Judge Larry V. Starcher presiding, on
paragraphs 6 and 9 of the Plaintiff's
Motion for New Trial.

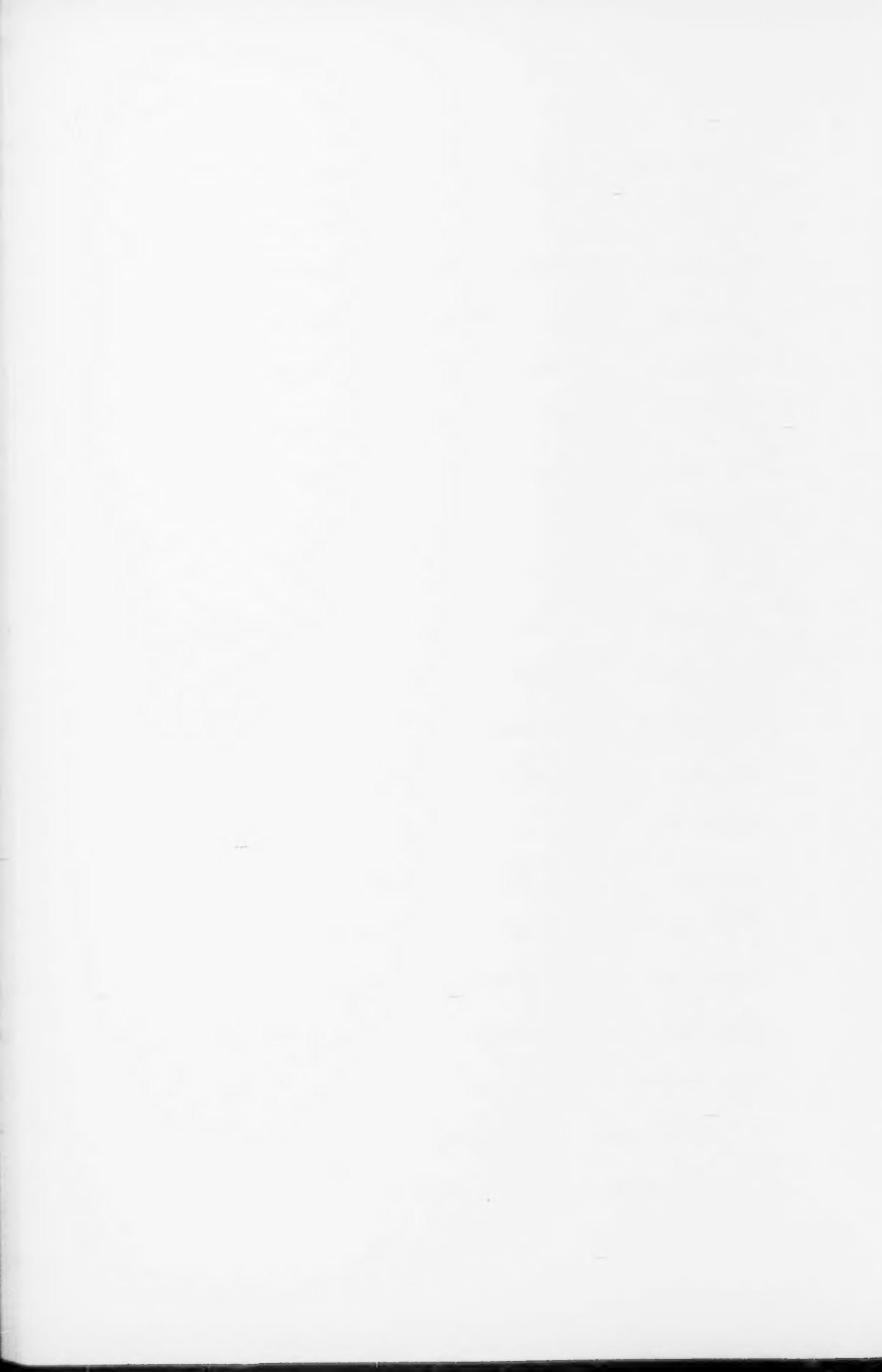
Facts

This matter was tried before a
jury with Judge Callie Tsapis of the
Circuit Court of Ohio County
presiding. This is a contract case
involving the sale of aggregates. The

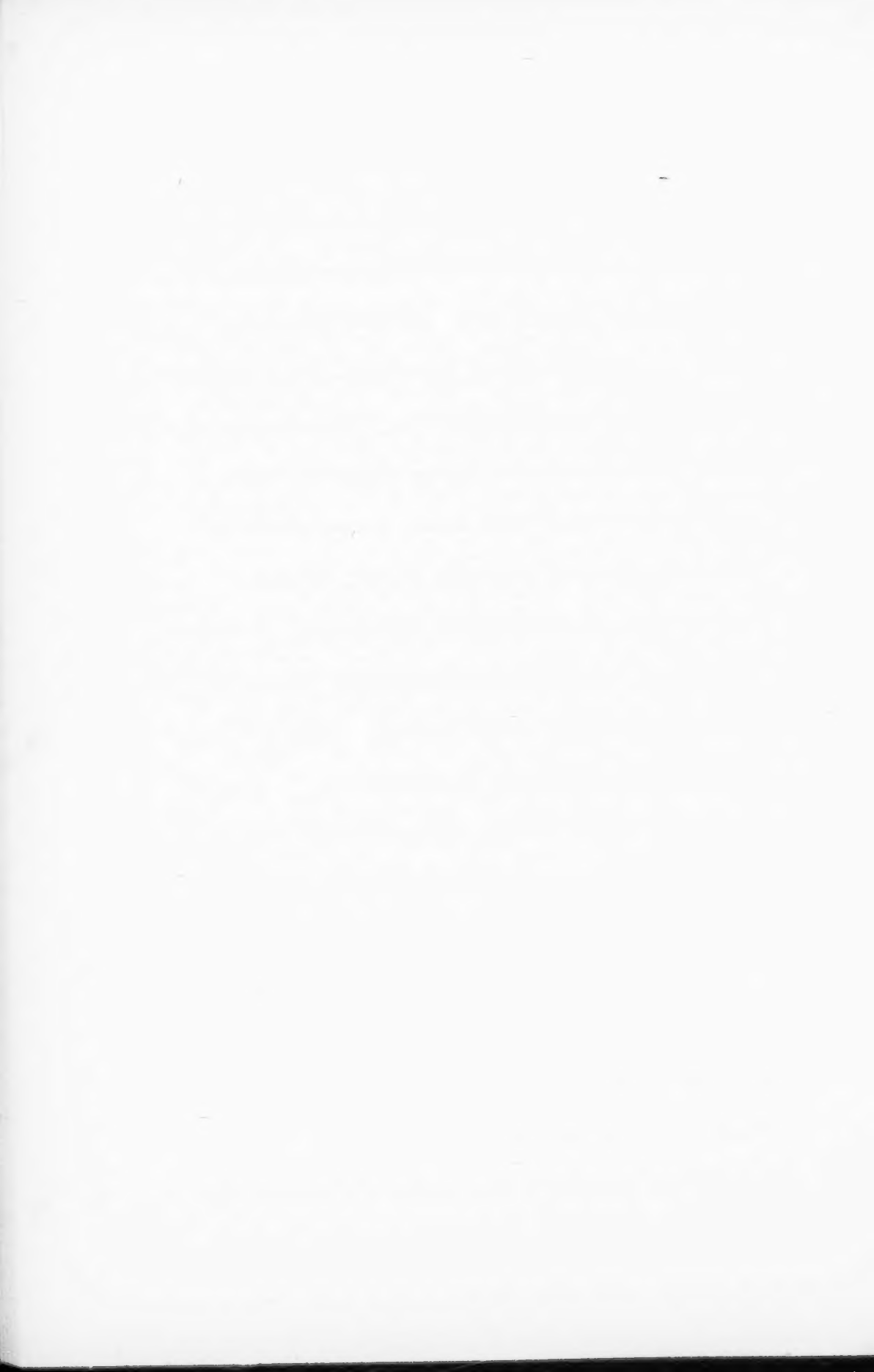
case was bifurcated. In July of 1988 a trial was held in which the jury was to determine which of two contracts was operative. The contracts were designated "Contract A" and "Contract B". The jury subsequently found that "Contract A" was the operative contract.

A second trial was held in November of 1988 before the same jury. The jury was then to determine whether either party breached "Contract A". If the jury found the contract had been breached, it was then to determine what damages had resulted. The jury found that the contract had been breached by the plaintiff and awarded the defendant \$100,000.00 on its counterclaim.

On the morning of the second day of the second trial one of the jurors



approached Judge Tsapis. The juror indicated to the judge that she or some other members of the jury had "feelings" about one of the parties that would possibly prevent them from reaching a fair verdict. The juror also indicated to Judge Tsapis that these feelings had been generated by evidence heard in the first trial. The juror also stated that she wondered whether there would be feelings about this being a big corporation versus a small corporation. Judge Tsapis did not immediately alert counsel for the parties about her conversation with the juror. The judge did, however, alert counsel while the jury was deliberating. Neither plaintiff nor defendant made any motions at that time. A verdict was then returned in



favor of the defendant for \$100,000.00. Judge Tsapis then polled the jury and asked them if their verdict was based solely on the evidence. Each of the jurors indicated that their verdict was for the defendant and based solely on the evidence. The plaintiff subsequently made its Motion for a New Trial.

Judge Tsapis requested the Supreme Court to recuse her and all First Circuit judges and that the part of the Motion for New Trial that raised the issue of her conversation with the juror be considered by a judge from another circuit. In its Administrative Order dated January 24, 1989 the Supreme Court granted this request and appointed Judge Larry V. Starcher of the 17th Judicial Circuit to decide this issue.

Discussion

Plaintiff has contended that the verdict in the second trial should be set aside based solely upon the judge's failure to disclose the juror's concern about prejudice toward one of the parties. The plaintiff argues that if the Court had disclosed the juror's concerns, the entire jury panel could have been voir dired and that the judge and/or counsel could have then acted accordingly. However, the jurors' responses when polled clearly showed that Judge Tsapis took sufficient steps to ensure that the jury was not influenced by bias or prejudice and that the verdict was based solely on the evidence. Judge Tsapis also took other precautions to preserve a fair trial. In the initial charge to the jury, the judge stated:

You must find your verdict unaided, unassisted, and uninfluenced by any personal information which you might have, and you must not permit yourselves to be guided, influenced, or swayed by sympathy or by your personal feeling regarding any of the parties.

In the final charge to the jury the judge stated:

You are further charged that any personal opinion which you may have as to the facts not established by the evidence presented in this case, cannot be considered by you as the basis of your verdict.

Moreover, Judge Tsapis amended Defendant's Instruction No. 7 and added the following:

I must also instruct you that your verdict should not be based on any personal feelings such as whether you like or dislike any witness or party, or as to whether



you are considering a small corporation versus a large corporation.

Judge Tsapis also stated in her comments made at the conclusion of closing arguments that "Personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." She also stated "and I decided to emphasize that in the final charge."

Usually, determinations of whether a jury is biased or prejudiced is left to the discretion of the trial judge. State v. Gargiliana, 138 W.Va. 376, 379, 76 S.E.2d 265, 267 (1953) cited in West Virginia Dept. of Highways v. Fisher, __ W.Va. __, 289 S.E.2d 312 (1982). In the case at hand, Judge Tsapis took steps which she believed would preserve a fair trial.



Ordinarily, the verdict of the jury when based on the evidence, will not be disturbed if there is a rational basis for such verdict taking into consideration all of the evidence relating thereto. Virginia Land Immigration Bureau v. Perrow, 119 Va. 831, 89 S.E. 891 (1916), cited in Salerno v. Manchin, 158 W.Va. 220, 213 S.E.2d 805 (1974).

A trial court may, in its discretion, refuse to set aside a verdict and grant a new trial when the application is based only upon the desire of the parties to have another trial. Guyandot Valley R. Co. v. Buskirk, 57 W.Va. 417, 50 S.E. 521 (1905).

The trial court cannot properly set aside a verdict and grant a new trial when it has committed no error



to the prejudice of the party against whom the verdict was rendered and the verdict is not plainly contrary to the law and the evidence. Rosenthal v. Fox, 70 W.Va. 752, 74 S.E. 959 (1912). In the current case, the jury was fully, fairly and accurately instructed and plaintiff has demonstrated no reason to believe the verdict was not based solely on the evidence.

The plaintiffs failed to timely object to Judge Tsapis' disclosure, choosing instead to gamble on the outcome of the trial. Since a verdict for the defendants was returned, plaintiff cannot now claim they were deprived of a fair trial. A right is waived when the right exists, the party charged with the waiver knows of the right's existence, and there is a



voluntary intention to relinquish it.

Hoffman v. Wheeling Sav. & Loan

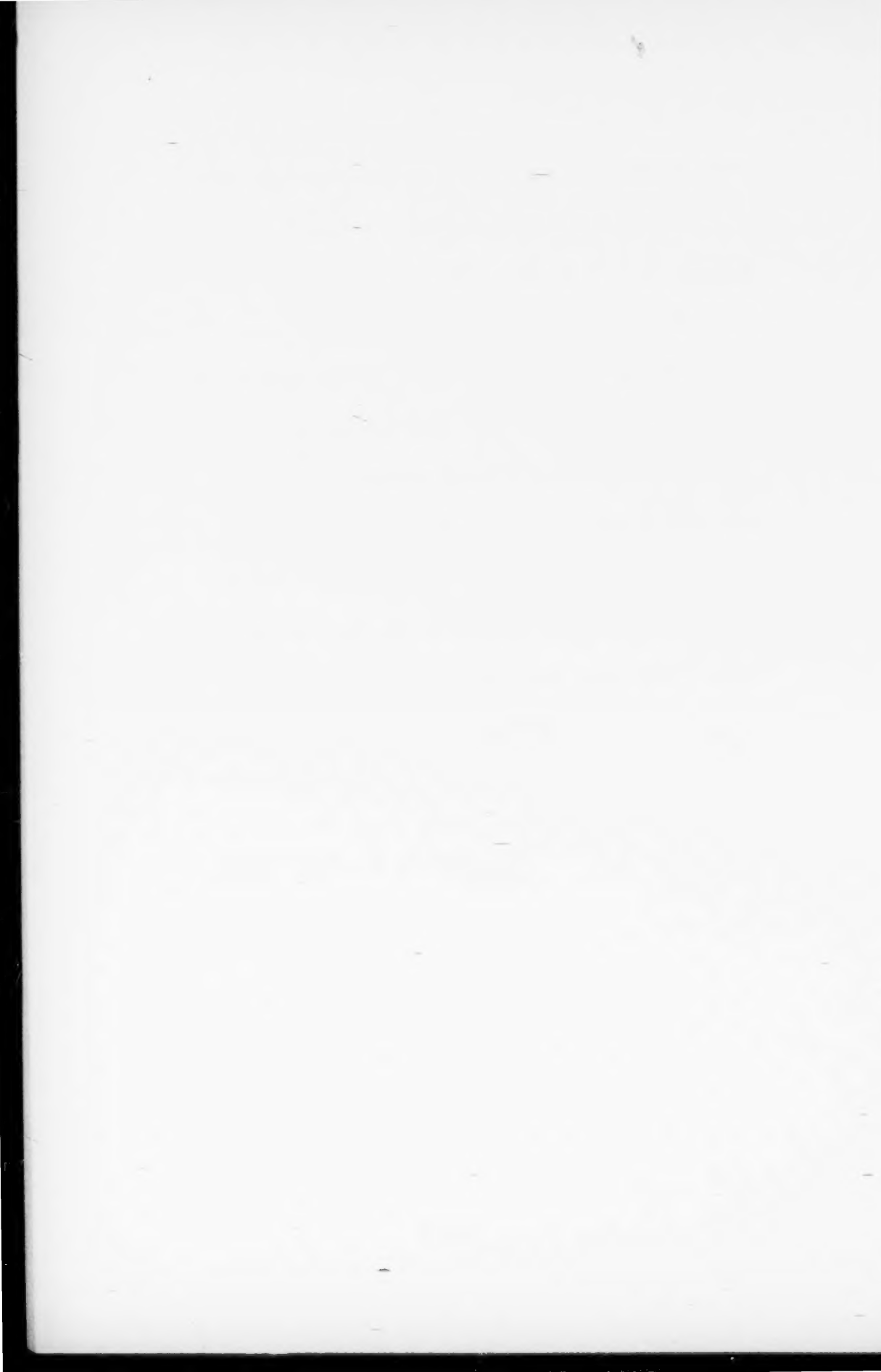
Assoc., 133 W.Va. 694, 57 S.E.2d 725

(1950).

Based on the above, this Court is of the opinion that the plaintiff received a fair trial which was free of any bias or prejudice and hereby DENIES the plaintiff's Motion for a New Trial with respect to paragraphs 6 and 9 of its Motion.

ENTER: February 23, 1990

/s/ Larry V. Starcher
JUDGE



FOOTNOTE

¹It may be that the passage of time will preclude an effective hearing because of fading memories of the jurors. That question, however, is properly one for the state court to determine. If effective hearing cannot be had, then Petitioner should be entitled to a new trial.